

# FOREIGN BUSINESS AND CONSUMER RIGHTS: A SURVEY OF CONSUMER PROTECTION LAW IN CHINA

Mark Williams\*

## INTRODUCTION

The accepted wisdom of the economic titans of the west is that China is a land of opportunity.<sup>1</sup> Untold millions of consumers are apparently eagerly waiting for the benefits of Western consumer-oriented capitalism. The oft-repeated nostrum appears to be that any self-respecting multi-national cannot afford to ignore the huge market<sup>2</sup> and the profit bonanza that surely will be the prize of the bold entrepreneur who commits early to the Chinese market. Does this view represent reality or do those who have committed huge sums to unprofitable joint venture enterprises need to perpetuate such a myth to reassure anxious shareholders? The answer is yet to be determined.

However, the imminent entry of China into the World Trade Organization (WTO) will inevitably lead to increased opening of the domestic market to imports and goods and services produced locally by foreign enterprises and so the potential opportunities for foreign firms' interaction with the Chinese market will undoubtedly increase. The reduction of tariffs, most favored nation status and national treatment of foreign goods as promised by the trade agreements already signed with the United States of

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\* Assistant Professor of Law, Hong Kong Polytechnic University

1. A recent survey of the CEO's/CFO's of 1000 global companies found that China was the second most favoured recipient of foreign direct investment after the United States of America. The reasons for this confidence in the Chinese market place resulted from three factors – size of the potential market and a growing “middle class”, entry by China into the World Trade Organization and “normalization of China's policy behaviour”. See A. T. Kearney, Inc., *FDI Confidence Index* (Feb., 2001), at <http://www.atkearney.com>.

2. China has a population of over 1.2 billion people. See 2000 CHINA STAT. Y.B. (China Statistics Press, Beijing).

America<sup>3</sup> and the European Union<sup>4</sup> will, subject to effective implementation, ensure greater market penetration by goods and services produced by foreign providers. One legal issue, often overlooked by euphoric economic propaganda, is the potentially costly consequences of defective consumer products or other breaches of the relatively complete Chinese legal corpus that penalizes inappropriate trade practices by manufacturers or sellers of goods or the providers of services.

This article seeks to consider the historical and theoretical perspectives of consumer protection law in China, explain the significance of the structure of the domestic Chinese economy and the role of the various state bodies responsible for domestic economic regulation. The major Chinese enactments that seek to protect domestic consumer interests are described and analyzed, along with examples of some recent local consumer protection regulations in Shanghai and Beijing. Further, private enforcement of the provisions are considered.

### THE HISTORICAL PERSPECTIVE

Traders and men of business were treated with caution and some suspicion in ancient China. Both Confucius and Mencius thought that commercial activity was bad in principle,<sup>5</sup> while the Zhou ritual placed merchants at the bottom of the social scale.<sup>6</sup> In modern China, that is, after the establishment of the People's Republic in 1949 until the establishment of the Open Door policy in 1978, consumer protection as a body of law was almost entirely neglected for ideological and practical reasons. Consumerism implied reliance upon capitalist means of production, rather than upon the collective norms of socialist production. Law as a means of enforcing individual rights and obligations was unavailable both because all pre-revolutionary Republic of China<sup>7</sup> legislation was abrogated and because the Soviet model of Socialist Legality was adopted. In this context the very existence of law became debatable in the sense of enforceable legal obligations and the legal profession. Both practitioners and judicial officers

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3. See Press Release, Office of the U.S. Trade Representative, Executive Office of the President, U.S., *China Signed Historic Trade Agreement* (Nov. 15, 1999), available at <http://www.ustr.gov/releases/1999/11/99-95.pdf>.

4. See Press Release, Delegation of the European Commission to the United States, European Union, *EU-China Agreement on WTO* (May 19, 2000), available at <http://www.eurunion.org/news/press/2000/2000023.htm>.

5. See HSIAO KUNG-CHUAN, *A HISTORY OF CHINESE POLITICAL THOUGHT* (F. W. Mote trans., 1979).

6. ZHOULI, 4<sup>th</sup> century BC.

7. The Communist seizure of power led to a new legal order in which the Republican Civil Code of 1929-30 based largely on the German, Swiss and Japanese civil codes was abrogated.

were relegated to the status of "legal workers" in the service of the State. Law, in any commonly accepted sense, ceased to have meaning for a period of two decades commencing in the late 1950s.

However, following the assumption by Deng Xiaoping of full State and Party pre-eminence in the late 1970s, the Chinese State began the slow process of rebuilding a recognizable legal system. Priority was given to economic law, that is, regulations<sup>8</sup> to permit and encourage external participation in China's prostrate economy particularly by encouraging the establishment of export-oriented foreign-funded<sup>9</sup> businesses that would earn sorely needed foreign exchange. In time other objectives were also pursued including the encouragement of private sector domestic production,<sup>10</sup> technology transfer,<sup>11</sup> and limited participation of foreign capital in China's domestic market.<sup>12</sup> Foreign related entities in the form of equity joint ventures, contractual joint ventures, and later, wholly foreign owned enterprises were permitted and then encouraged. The imminent entry of China to the WTO, heralded by the bilateral trade agreements signed between the United States and China in November 1999 and with the European Union in May 2000, will increase foreign participation in the domestic market to an unparalleled degree. These

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8. The first piece of relevant legislation in the new era was the Law of Chinese-Foreign Equity Joint Ventures (1979). See ZHONGHUA RENMIN GONGHEGUO ZHONGWAI HEZI JINGYING QIYE FA (1979) [EQUITY JOINT VENTURE LAW OF THE PEOPLE'S REPUBLIC OF CHINA (1979)], in ZHONGHUA RENMIN GONGHEGUO FAGUI HUIBIAN 1979 [COMPILATION OF LAWS AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA 1979] 125-9 (1979).

9. Foreign direct investment, which includes projects aimed at the domestic and export markets, is lead by Hong Kong investors which have consistently accounted for the lion's share of all foreign, direct investment in the Chinese mainland. For example in 1999 the totals were as follows: ( in billions of US\$) Hong Kong 16.36, EU 4.48, USA 4.26, Japan 2.97, Singapore 2.64 and Taiwan 2.6. See 2000 CHINA STAT. Y.B. *supra* note 2.

10. See ZHONGHUA RENMIN GONGHEGUO JINGJI HETONG FA (1981) [ECONOMIC CONTRACT LAW OF THE PEOPLE'S REPUBLIC OF CHINA (1981)], in ZHONGHUA RENMIN GONGHEGUO FAGUI HUIBIAN 1981 [COMPILATION OF LAWS AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA 1981] 1-20 (1981).

11. See ZHONGHUA RENMIN GONGHEGUO JISHU HETONG FA (1987) [TECHNOLOGY CONTRACT LAW OF THE PEOPLE'S REPUBLIC OF CHINA (1987)], in ZHONGHUA RENMIN GONGHEGUO FAGUI HUIBIAN 1987 [COMPILATION OF LAWS AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA 1987] 873-86 (1987).

12. See ZHONGHUA RENMIN GONGHEGUO SHEWAI JINGJI HETONG FA (1985) [FOREIGN ECONOMIC CONTRACT LAW OF THE PEOPLE'S REPUBLIC OF CHINA (1985)], in ZHONGHUA RENMIN GONGHEGUO FAGUI HUIBIAN 1985 [COMPILATION OF LAWS AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA 1985] 321-9 (1985). See also ZHONGHUA RENMIN GONGHEGUO WAIZI QIYE FA (1986) [WHOLLY FOREIGN OWNED ENTERPRISE LAW OF THE PEOPLE'S REPUBLIC OF CHINA (1986)], in ZHONGHUA RENMIN GONGHEGUO FAGUI HUIBIAN 1986 [COMPILATION OF LAWS AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA 1986] 495-499 (1986) [hereinafter WFOE Law 1986].

changes will inevitably draw more foreign businesses into the domestic market and the transactions, in most cases, will be governed by Chinese law. Whether foreign businesses will be adequately advised on consumer protection issues is far from clear.<sup>13</sup>

## ECONOMIC AND THEORETICAL ISSUES

From a theoretical perspective, consumer protection law is also problematic from the Chinese perspective. Under the previous purely socialist economic system, the State emphasized the importance of production and neglected the interests of consumers. Production on any scale was in the hands of the state via state-owned industries (SOEs) or collective enterprises. The private sector had no part to play in the economy. However, even after over twenty years of reform the mind set of government, particularly at the local level, still emphasizes the close ties between government and producers and the identification that what is good for producers is in the public interest. Additionally, the producer bias also tends to promote quantity over quality. In a recent article, Hu Keming, a senior official in the central government's Department of Industry Communication and Commercial Affairs, confirmed that local politicians tend to "emphasise quantity and underestimate quality."<sup>14</sup> This confirms that a gulf remains between central government that wants to improve the quality of products and thereby enhance the lot of consumers and local political interests that maintain their *dirigiste* philosophy.<sup>15</sup>

Legal scholars also dispute the place of consumer protection laws in the hierarchy of the Chinese legal pantheon. The issue of whether the 1993 consumer protection statute is a general law

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13. In a recent case, widely reported in China, Toshiba, the Japanese computer manufacturer, was castigated in the press for refusing to compensate Chinese consumers who had allegedly suffered as a result of software "bugs" contained in computer programmes preloaded into the hard discs of lap-top computers. Toshiba allegedly refused to compensate Chinese consumers because of what it perceived were deficiencies in Chinese consumer protection law. This view, if actually held by the company, is erroneous, as will be demonstrated later. A Chengdu consumer, Wu Jin, was preparing to lodge a claim in the People's Court to assert his rights to compensation for the losses he claimed to have suffered as a result of the products defects. What aggravated the Press even more was the assertion that Toshiba had already compensated American consumers for the same faults but denied any liability under Chinese law. Guo Aibing, *Toshiba to Spell Out Compensation Issue*, CHINA DAILY, May 19, 2000, at 3.

14. Hu Keming, *An Important Legal Guarantee for Strengthening the Management and Oversight of Product Quality*, 8 CHINA L. 70 (2000).

15. *dirigisme* (n) Fr. Economic planning & control by the state. WEBSTERS 3<sup>RD</sup> NEW INTERNATIONAL DICTIONARY 1993.

(basic law) or a special law engages Chinese academic writers.<sup>16</sup> A further complication will be the interaction of the proposed Chinese Civil Code and the consumer statutes. Currently, the national legislature has enacted a new comprehensive contract statute<sup>17</sup> which will apparently form part of the proposed civil code.<sup>18</sup> Work is underway on drafting a comprehensive statute on real and personal property, the law of persons, and non-contractual obligations. The completion of this task will take many years and in the meantime such basic issues as the nature of property rights in China still remain obscure. Consequently, it is legitimate to ask precisely what rights the consumer protection statutes seek to protect? At present no conclusive answer can be given.

Thus, consumer protection law is a new subject in China and is beset with many theoretical and practical difficulties. What should the scope of the law be? Should it be classified as economic law or civil law, as both enterprises and natural persons are involved? How can consumers be educated about their newly granted legal rights and how can they effectively enjoy those rights when many producers are powerful State Owned Enterprises (SOEs) or private sector producers or retailers? How and in what circumstances should government intervene in enforcement of consumer rights? In China's haste to attempt to make good the two decades of economic ennui by breakneck industrial and commercial expansion, what regard have authorities given to the rights of the vast millions of ordinary Chinese consumers? To attempt to answer that question it is necessary to consider briefly the structure of the Chinese domestic economy, the role played by the various organs of State power, and to examine the relevant consumer related legislation.

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16. See Li Yougen, *The Protection of Consumer's Rights and Interests and Legal Interpretation*, NANJING U. L. REV. 166 (Autumn 1996).

17. PRC Contract Law 1999 was passed into law by the National People's Congress on March 15<sup>th</sup> 1999 after many years gestation. It unified the previous conflicting contract regimes and also introduced controls for the first time on standard form contract stipulations that might disadvantage consumers. See ZHONGHUA RENMIN GONGHEGUO HETONG FA (1999) [CONTRACT LAW OF THE PEOPLE'S REPUBLIC OF CHINA (1999)], in ZHONGHUA RENMIN GONGHEGUO XIN FAGUI HUIBIAN 1999 DI YI JI [NEW COMPILATION OF LAWS AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA 1999 VOL.1] 4-67 (1999) [hereinafter Contract Law 1999] (see later discussion).

18. The drafting of a comprehensive civil code is a difficult and time-consuming process. No end is yet in sight. A review of progress is undertaken by Professor Yang Zhenshan in *The Quest for the Civil Code: Prospects for China's Civil Legislation*, 6 CHINA L. 93 (2000).

## THE STRUCTURE OF THE DOMESTIC ECONOMY

The Chinese domestic economy is still officially described as “a Socialist market economy.”<sup>19</sup> The paradox inherent in this phrase defies a rational explanation. However, at least on a formal level, it remains the stated goal of the Chinese State.

The State still protects significant areas of economic activity that are reserved exclusively for SOEs<sup>20</sup> or domestic businesses exclusively owned by Chinese nationals. Some areas of the domestic economy are partly open to joint venture enterprises, that is, to entities owned jointly by foreign and Chinese interests and established under special Chinese legislation. Wholly owned foreign enterprises are also allowed some access to domestic markets and repatriation of profits from domestic sales is subject to foreign exchange balancing provisions.<sup>21</sup>

The domestic market is characterized by chronic overproduction of many consumer goods by heavily subsidized SOEs that are judged successful in terms of volume of production, not profitability. The central government announced a bold plan of incorporating thousands of smaller SOEs in 1998 but the risk of unacceptable levels of unemployment and consequent social instability inherent in any push for increased productivity have made political leaders hesitant about the process.<sup>22</sup>

The imminent entry of China into WTO will cause further shocks to this economic structure as increasing volumes of foreign goods are allowed to compete with domestic products. Tariffs and quotas will fall dramatically<sup>23</sup> and so economic change in the next five years is inevitable.

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19. See ZHONGHUA RENMIN GONGHEGUO XIANFA (1982) [CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA (1982)] art. 16 (as amended in Mar. 15, 1999).

20. State businesses are given monopolies or quasi-monopolies in various economic sectors – precious metals, primary real estate, radio and audio products, rubber, pressure containers, pharmaceuticals, rubber products, defence products, various raw materials including non-ferrous metals and various petro-chemical products. See NEIL F. GREGORY, CHINA'S EMERGING PRIVATE ENTERPRISES: PROSPECTS FOR THE NEW CENTURY 37 (2000).

21. See WFOE LAW 1986 art.18, *supra* note 12, at 498. See also ZHONGHUA RENMIN GONGHEGUO WAIZI QIYE FA SHISHI XIZE [IMPLEMENTATION RULES OF WHOLLY FOREIGN OWNED ENTERPRISE LAW OF THE PEOPLE'S REPUBLIC OF CHINA] art. 56, in ZHONGHUA RENMIN GONGHEGUO FAGUI HUIBIAN 1990 [COMPILATION OF LAWS AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA 1990] 378 (1990).

22. See Brahm & Lu, *State Owned Enterprise Reform in China*, 25 ASIA BUS. L. REV. 18 (1999). See also NICHOLAS R. LARDY, CHINA'S UNFINISHED ECONOMIC REVOLUTION (1998).

23. All import quotas will be eliminated by 2006; tariffs will be removed on computers and semi-conductors by 2005 and reduced to 17.5-22% on agricultural products, an average of 9.4% for industrial products down from 24.6% and to 25% for motor vehicles down from 80-100% by 2006. US/EU-China Bilateral Trade Agreements, see *supra* notes 3, 4.

Further, the aims and activities of the central government are not always in line with provincial or local government priorities and conflicts between national and local priorities are common.<sup>24</sup> Local sponsorship of regional champions leads to protectionism by means of arbitrary local taxes or quotas on goods produced in China but from another province. It is also common for local governments to order local branches of state-owned banks to extend credit lines to local producers on non-commercial terms, without which many local SOEs would fall immediately into insolvency and be quite unable to meet their obligations to pay wages or other debts. The notorious triangular debt problem<sup>25</sup> of irrecoverable debts involving SOEs, who purchase goods from other SOEs and sell products to a third SOE, where all three transactions are completed with credit, and none of the parties to the transactions have any prospect of paying their creditors or receiving their debts, only exacerbates local protective instincts. Consequently, local government protection of local producers of goods is prevalent. Another complication for consumers is that local government also funds and supervises local courts and given that the interests of local government and local business are so intertwined, consumer actions against local manufacturers or local retailers can run into severe enforcement difficulties. However, such constraints will be less evident when the object of consumer dissatisfaction is a private sector or joint venture or wholly foreign owned business.<sup>26</sup> Still, local government may also be a stakeholder, as opposed to a joint owner, and so may have some vested interest in protection of all local business entities.

One of the most important issues to consumers is that of the quality of domestically produced goods. The Chinese domestic market is plagued by low quality pirated goods bearing trademarks of nationally or internationally renowned manufacturers. Clothing, accessories, shoes, electrical and electronic goods, food and drink, household products such as detergents, toothpaste, cosmetics, medicines, optical and audio discs are all subject to counterfeiting on a vast scale. Consumers are constantly confused and often defrauded by unscrupulous retailers passing off pirated products. It is interesting to note that this issue is seriously regarded by the central Chinese authorities, at least as reflected by the number of regulations in force prohibiting such

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24. See Hu, *supra* note 17. See also Williams, *Competition Law Developments in China*, 5 J. BUS. L. 273 (2001).

25. See EDWARD S. STEINFELD, FORGING ECONOMIC REFORM IN CHINA: THE FATE OF STATE OWNED INDUSTRY (1998); LARDY, *supra* note 22.

26. See Guo, *supra* note 13; Su, *infra* note 62 (discussing Toshiba and Watsons cases).

conduct. Enforcement on the local level, however, is entirely another matter. Thus, there are some taxing problems that face the contemporary Chinese consumer.

### CONSUMER PROTECTION LEGISLATION – WHO MAKES THE LAW?

China is a unitary state, not a federation. Governmental power flows outward from the center. The National People's Congress is the highest organ of state power which roughly corresponds to a national assembly, though it only meets once a year and law making powers are often delegated to a standing committee. The Chinese Communist Party tightly controls both bodies' membership. The PRC Constitution<sup>27</sup> does grant limited authority to lower levels of government to enact secondary and local legislation. The power to legislate by the promulgation of regulations and other secondary legislation held by various ministries and commissions only further complicates the situation. The lack of clear demarcation of powers in the past has often caused a great many problems, not least of which has been the menace of overlapping or contradictory regulations. The situation should improve in the future due to the recent passage of the Law-Making Law,<sup>28</sup> which attempts to apportion legislative powers more distinctly between the various governmental bodies. But many problems remain. One of the most intransigent is that many administrative orders are for internal use only and are never publicized. Transparency still has a long way to go in China.

### THE PRINCIPAL LEGISLATION

From the preceding discussion of the complexities of law-making in China *supra* pp.10-11, it can be appreciated that a comprehensive analysis of all applicable laws country-wide would be a task beyond the scope of this article. Instead, the article includes a discussion of the main pieces of national legislation with some reference to the local situation in Shanghai and Beijing, which tend to have the most developed consumerist cultures in China.

The basis of consumer protection law in China is the General Principles of Civil Law (GPCL) 1986. If a substandard product causes property damage or physical injury to a person, then the manufacturer or seller shall bear civil liability according to

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27. See ZHONGGUA RENMIN GONGHEGUO XIANFA (1982) [CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA(1982)] arts. 99-100 (as amended in Mar. 15, 1999).

28. Passed at the NPC meeting in March 2000.

law.<sup>29</sup> The manufacturer has the ability to claim indemnity from a carrier or the seller should the defect be caused by their actions. Products are not defined but presumably they do not include land or buildings, as injury sustained as a result of defective premises can be compensated under another provision.<sup>30</sup> Liability here appears to be in delict rather than in contract.

The first piece of specific law to address consumer interests was the Product Quality Law 1993 (PQL).<sup>31</sup> The general provisions of the law provide that one of its objectives is to "protect the legitimate rights and interests of users and consumers."<sup>32</sup> Thus, this is not only a consumer protection statute, as business buyers or users of products are also protected. It provides a statutory basis of liability for defective products in addition to any separate contractual liability. Both producers and sellers of products are required to abide by the law and products are defined as anything "which is processed or manufactured for the purpose of sale."<sup>33</sup> Buildings and structures are not products but it is unclear whether primary unprocessed agricultural produce is within the definition of a product or not. Arguably, since unprocessed agricultural products are not processed or subject to a manufacturing process, they do not come within the scope of the PQL. Liability is then imposed on manufacturers and sellers for products that do not meet the statutory quality requirements.<sup>34</sup> The law goes on to provide that the use of false quality marks on products is prohibited.<sup>35</sup> Chapter two of the PQL provides for a system of state authentication and supervision of product quality.

Chapter three details the liabilities of producers and sellers of products. Producers should ensure that their products are free from unreasonable dangers that threaten human life or property and should conform to relevant national or trade standards as appropriate. Products should also possess the properties and functions they ought to possess. They should also conform to any specific quality warranties that are marked on the product it-

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29. See ZHONGHUA RENMIN GONGHEGUO MINFA TONGZE [GENERAL PRINCIPLES OF CIVIL LAW OF THE PEOPLE'S REPUBLIC OF CHINA] art. 122, in ZHONGHUA RENMIN GONGHEGUO FAGUI HUIBIAN 1986 [COMPILATION OF LAWS AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA 1986] 1-33 (1986).

30. *Id.* art. 126.

31. See ZHONGHUA RENMIN GONGHEGUO CHANPIN ZHILIANG FA 1993 [PRODUCT QUALITY LAW OF THE PEOPLE'S REPUBLIC OF CHINA 1993], in ZHONGHUA RENMIN GONGHEGUO XIN FAGUI HUIBIAN 1993 DI YI JI [NEW COMPILATION OF LAWS AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA 1993 VOL. 1] 29-39 (1993) (enacted by the NPCSC on February 22nd, 1993 and effective from September 1st, 1993) [hereinafter PQL 1993].

32. *Id.* art. 1.

33. *Id.* art. 2.

34. *Id.* art. 3.

35. *Id.* art. 4.

self.<sup>36</sup> Consumer information should also be stated on the product packaging. This should include a warranty stating the nature of quality testing procedures adopted, the name and address of the manufacturer, specification, constituent ingredients or components as appropriate. Production date, usage date, and appropriate warning notices, if the product has inherent dangers associated with its operation, should be stated in the Chinese language.<sup>37</sup> Exemptions are provided for loose food products or other unpackaged commodities. Where the product is inherently dangerous or fragile or requires special handling or storage procedures, it should also be clearly marked.<sup>38</sup> Sellers should check the provenance of the products they sell,<sup>39</sup> should adopt measures to store the products in good order,<sup>40</sup> and should not apply false marks of quality or origin to products.<sup>41</sup>

Chapter four of the PQL allows for consumer compensation when products do not meet the appropriate quality standard. Sellers have restricted liability. They are liable to repair, replace or provide a refund of the price of a product that does not conform to quality standard. Both users and consumers enjoy these rights. Additionally if the product has caused any other loss as a result of not having the specified functions, defective instructions as to use, or nonconformity to claimed product standards marked on the product or its package or by reason of a difference between the product and a sample supplied or with literature provided with the product,<sup>42</sup> the seller is also liable.

However, sellers have a right of indemnity either from persons who supplied them with the product or from the manufacturer.<sup>43</sup> The standard of liability is a strict one; neither intent nor negligence must be proved. However, where the defect in the product is caused by the seller's fault, the seller is liable for any personal injury or damage to property other than the thing sold.<sup>44</sup> Fault is not defined but, it is submitted, it must encompass both deliberate and reckless acts as well as mere negligence.

Producers' liability<sup>45</sup> is more extensive. A duty is owed, presumably, to both users and consumers of defective products that cause personal injury or death or damage to property other than

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36. *Id.* art. 14.

37. *Id.* art. 15.

38. *Id.* art. 16.

39. *Id.* art. 21.

40. *Id.* art. 22.

41. *Id.* arts. 25, 26.

42. *Id.* art. 28.

43. *Id.* art. 30.

44. *Id.* art. 30.

45. *Id.* art. 29.

the product itself. Liability is strict.<sup>46</sup> Causation is required but neither negligence nor intentional conduct on the part of the producer is required.<sup>47</sup>

A number of statutory defenses are provided in the same section, including: "a) that the product was not put into circulation, b) that the defect in the product did not exist when the product was put into circulation, and c) that when the product was put into circulation, the current state of scientific or technical knowledge was incapable of detecting the defect."<sup>48</sup>

Thus, consumers who suffer death, personal injury or damage to other property may have a claim against producer, seller, or both. Producers and sellers have rights to cross claim against each other for indemnity<sup>49</sup> in appropriate cases and the court presumably can apportion damages to the appropriate malefactor and make orders for joint and several liability as appropriate.<sup>50</sup> The PQL also makes provision for the quantum of losses that can be recovered. Medical expenses, loss of earnings and reduction in earning capacity resulting from attributable disablement should be compensated. In cases of death, funeral expenses and family and dependent support payments can be ordered.<sup>51</sup> Interestingly, damages for pain and suffering and loss of amenity are not expressly mentioned but it is submitted that they must be compensable as "damage to human life."<sup>52</sup>

Property losses are compensated on a reinstatement basis. Relational economic losses are also probably provided for under a catch-all provision of "other serious losses."<sup>53</sup> Pure economic losses, namely those not consequent directly upon physical injury, might also be compensated but issues of causation and remoteness might prove a formidable hurdle to overcome.

A limitation period of two years from the date of knowledge or presumed knowledge of injury is imposed and there is also a long stop limitation provision (the maximum time period allowed from the date a cause of action arises to the date upon which suit must be issued) of ten years from the date that the product was

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46. *See id.*

47. *See id.*

48. *Id.*

49. *Id.* art. 31.

50. See ZHONGHUA RENMIN GONGHEGUO MINSHI SUSONG FA [CIVIL PROCEDURE LAW OF THE PEOPLE'S REPUBLIC OF CHINA] art. 56, in ZHONGHUA RENMIN GONGHEGUO XIN FAGUI HUIBIAN 1991 DI ER JI [NEW COMPILATION OF LAWS AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA 1991 VOL. 2] 3-65 (1991), for joinder of parties and apportionment.

51. PQL 1993 art. 32.

52. *Id.* arts. 29-32.

53. *Id.* art. 32, sec. 2.

first placed in circulation.<sup>54</sup> Finally, product defect is defined as “an unreasonable danger inherent in a product that endangers human life or other property.”<sup>55</sup>

The leading statute which protects consumers' interests is the Consumer Rights and Interests Law 1993 (CRIL).<sup>56</sup> The explicit purpose of this law is to “protect the legitimate rights and interests of consumers . . . and to promote the healthy development of the socialist market economy.”<sup>57</sup> Consumers are defined as “[those] who buy or use commodities for [the] purposes of daily consumption or those who receive services.”<sup>58</sup>

As can be readily appreciated, the definitions of “consumer,” “commodities,” and “services” are opaque. A consumer appears in context not to be a purchaser of goods or services in the course of business but this is not explicit. No exclusions are made for primary agricultural products or land; no distinction is made between a consumer use or a business use of a commodity; as regards services, their nature is not explained. It is a matter of conjecture whether services provided by government departments, hospitals, educational institutions, SOE's, quasi-governmental bodies or collective enterprises are included within the scope of the statute. One might speculate that only services provided for gain and not in furtherance of state obligations are to be considered within the purview of this law.

The law grants consumers certain rights as against producers. They are entitled to expect personal safety and the safety of their other property that might be adversely affected by the product bought or service supplied.<sup>59</sup> Consumers are also entitled to accurate information about the commodity or service<sup>60</sup> as well as a right to receive compensation for personal injury or property damage sustained as a result of use of the product or the provision of the service.<sup>61</sup> Consumers also have the right to respect for their personal dignity, national customs and habits.<sup>62</sup>

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54. *Id.* art. 33.

55. *Id.* art. 34.

56. Enacted by the NPCSC on October 31st, 1993 and effective from January 1st, 1994.

57. ZHONGHUA RENMIN GONGHEGUO XIAOFEIZHE QUANYI BAOHU FA [CONSUMER RIGHTS AND INTERESTS LAW OF THE PEOPLE'S REPUBLIC OF CHINA] art. 1, in ZHONGHUA RENMIN GONGHEGUO XIN FAGUI HUIBIAN 1993 DI SI JI [NEW COMPILATION OF LAWS AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA 1993 VOL. 4] 3-11 (1993) [hereinafter CRIL 1993].

58. *Id.* art. 2.

59. *See id.* art. 7.

60. *See id.* art. 8.

61. *See id.* art. 11.

62. *See id.* art. 14. In a highly publicized case involving a Shanghai branch of a Hong Kong based retailer, Watsons, a customer was wrongfully detained and physically searched by staff who suspected her of shop theft. She sued the store appar-

The provision of goods and services, within the meaning of the law, by "business operators," including either manufacturers or sellers or providers of services, imposes a number of mandatory obligations. The goods or service must comply with the PQL<sup>63</sup> and operators are obliged to provide a guarantee that, subject to normal use, the goods supplied will possess the expected quality or the advertised specifications or qualities such as performance and durability of the product.<sup>64</sup> Business operators are also prohibited, by contract term or notice, from including "unfair and unreasonable regulations against consumers;" if such tactics are employed, they are declared to be void.<sup>65</sup> However, no more detailed definition is offered as to the meaning of unfair and unreasonable regulations.

CRIL provides for enforcement by the local Industry and Commerce Departments<sup>66</sup> and also provides for the establishment of officially sanctioned Consumers' Associations charged with providing information and advice to consumers, assisting the enforcement bodies in their tasks, lobbying government on behalf of consumers, publicizing consumer complaints and assisting consumers in actions in the People's Courts. Should disputes arise, the statute provides for several methods of resolution – negotiation, consumer association brokered mediation, administrative enforcement or litigation in the People's Court.<sup>67</sup>

Liability is again joint and several as between the seller or producer of the relevant goods or services with provision for apportionment and indemnity as between themselves.<sup>68</sup> Liability appears to be tortious, and there appears to be no requirement for a contractual tie but a finding of fault seems to be necessary.<sup>69</sup> However, the translated English text is ambiguous and the use of the term "fault" may actually be construed to mean "caused by." Both personal injury and property damage are

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ently using Art.14 as the basis of her claim, even though she had not actually bought anything in the shop. She claimed that her dignity had been infringed when receiving a "service". She succeeded and was awarded RMB250,000 (approximately US\$30,000), subsequently reduced to RMB10,000 (US\$1,200) on appeal. [Note: RMB10,000 would be a good salary for 1 year for many workers in China]. Local legislation in Guangdong (a developed southern coastal province adjacent to Hong Kong) recently passed local legislation which provided mandatory damages of RMB50,000 (US\$6,000) for such illegitimate searches. See Su Dan, *Suffering Requires Protection*, CHINA DAILY, Sept. 7, 1999, at 2.

63. See CRIL 1993 art. 16.

64. See *id.* art. 22.

65. See *id.* art. 24.

66. See *id.* art. 28.

67. See *id.* art. 34.

68. See *id.* art. 35

69. See *id.*

compensable<sup>70</sup> but it is unclear if pure economic losses can be recovered. As regards the potential claimants, recovery is not limited to a consumer as the statute also appears to envisage that "other victims" who suffer loss as a result of the use of goods may also have a claim.<sup>71</sup> Apparently, only the recipient of services may sue, rather than a wider class of persons.<sup>72</sup>

The view that fault is not a necessary condition of liability for personal injury caused to the consumer or anyone else is fortified by two other provisions.<sup>73</sup> They provide that the victim can recover medical expenses, loss of income during period of illness or subsequent disability, nursing aids and dependants' loss of income consequent upon the victim's disability. In cases of death, funeral and dependants' financial losses can be claimed. Property damage can also be recovered<sup>74</sup> and the consumer can also require the seller/producer of a product to repair or replace the defective product at his expense, including all carriage costs.<sup>75</sup>

The liability provisions of the CRIL are troubling. It is not clear whether liability is strict or fault based, whether pure economic loss suffered by non-consumers is recoverable, and what control mechanism, if any, applies to remoteness of damage. Clearly, the oft expressed alarm in common law courts of the floodgates opening and allowing a deluge of claims,<sup>76</sup> especially in pure economic loss cases, is a potential concern to deep-pocketed multinational corporations who could become the target of unjustified or speculative litigation. It should be remembered that foreign firms are seen as fair game by Chinese consumers. As more foreign products and services become available in the Chinese market and consumers become more aware of their legal rights, a greater volume of litigation can confidently be predicted. The prudent entrant to the China market should consider this contingency when making plans for setting up or expanding in China, especially as the liability rules are vague and the number of potential claimants could be large.

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70. *See id.*

71. *See id.*

72. *See id.*

73. *See id.* arts. 41, 42.

74. *See id.* art. 44.

75. *See id.* art. 45.

76. *See, e.g.,* *Murphy v. Brentwood District Council*, 1 A.C. 461, 485 (1991) (per Lord Oliver). With respect to pure economic loss claims, see also JANE STAPLETON, *PRODUCT LIABILITY* (1994) for a comprehensive assessment of the development of strict product liability in the United States, the European Union and the United Kingdom. The author is very sceptical of the arguments against strict liability for damage caused by defective products. *See also* Jane Stapleton, *Duty of Care Factors: A Selection from the Judicial Menus*, in *THE LAW OF OBLIGATIONS: ESSAYS IN CELEBRATION OF JOHN FLEMING* 59 (1998).

A further interesting provision on liability is Article 49 of the CRIL. It provides that a business operator found to have committed fraud in providing goods or services shall compensate the consumer with double the price paid for the product. This provision is an important consumer protection provision and seeks to deal with a very widespread problem in China's retail market – that of passing off fake goods, usually bearing the trademark of a prestigious international brand, as genuine. Such conduct, even by large department stores, is common in China and as many customers have never seen the genuine article fraud is easy to perpetrate.

This phenomenon has even spawned a folk hero – Wang Hai. This peasant from Shandong province is either an exploitative rogue or a consumer champion, depending on one's prejudices. Since 1995, Wang has focused national attention on the fake product issue by exercising his rights under this provision. His *modus operandi* is to purchase in substantial department stores large quantities of products that appear to be fakes. He then returns the goods and demands a refund of double the purchase price. If the store refuses to do so, he sues in court. Issues of whether Wang is actually a consumer, whether the knowledge of the consumer that the goods are fake before he purchases them invalidate a claim, and whether the punitive nature of the provision is compatible with general civilian concepts have been discussed in various academic articles.<sup>77</sup>

Despite various set backs, Wang has certainly raised the profile of consumer protection in China and has enhanced public awareness of the legal protections afforded to consumers; he was even invited to discuss consumer protection with President Clinton during his 1998 state visit to China.<sup>78</sup> Clearly, if enough Chinese consumers employ the same tactics as Wang the effect would be considerable. Such action might even be a significant step in reducing the number of fake products that currently plague the Chinese consumer goods market.<sup>79</sup>

In addition to the CRIL, two laws were recently enacted that specifically address consumer protection. First, the Anti-Unfair

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77. See generally Feng Xiaoqing & Luo Shuzhi, *Wang Hai Phenomenon and Legal Protection for Consumers in China*, CONSUMER L. J. 359 (1998); LI YOUNGEN *supra* note 16; Cui Guobin, *Maturity of the Punitive Damages System in China*, CHINA ECON. TIMES (Beijing), Aug. 26, 1997, at 4; Yang Lixin, *Civil Law Considerations over Wang Hai*, 5 HEBEI J. OF LEGAL SCI. 1 (1997); Li Mingfa, *Fraud by Business Operators and Compensation Liability to Consumers*, 6 XI'AN L. SCI. 36 (1997); Wang Weiguo, *Fraud and Punitive Damages in the Protection of Consumers Rights and Interests*, 3 SHANGHAI L. SCI. 22 (1998).

78. See He Sheng, *Consumer Advocate Fights On*, CHINA DAILY, Jan. 25, 1999, at 8.

79. See *id.*

Competition Law of 1993<sup>80</sup> is a statute which contains a number of mixed provisions. Some are consumer protection orientated, while others address competition/anti-trust issues. The sale of fake goods, the illegitimate use of trademarks and the equivalent of common law passing off are all forbidden.<sup>81</sup> Misleading advertising or claims are also outlawed.<sup>82</sup> The statute is enforced by administrative supervision and fines,<sup>83</sup> but private parties can also claim damages for breaches of relevant provisions.<sup>84</sup>

Second, the Prices Law of 1997<sup>85</sup> provides that the price of all goods and services should be clearly displayed and that a price higher than the one marked cannot be charged.<sup>86</sup> Infringement can be dealt with by administrative sanction or by civil action.<sup>87</sup>

The Contract Law of 1999<sup>88</sup> is another major piece of legislation. It codifies the previous contract law system which had three separate governing statutes. It is a law of general application, but it has important consumer protection provisions including the requirement of good faith and fairness in contractual dealings. Further, the law regulates standard form contracts and limitation/exclusion clauses.<sup>89</sup>

Local governments in various provinces of China have now enacted detailed local legislation to implement the new Contract Law. One aspect of this, as a consumer protection measure, has been detailed rules to supervise standard form contracts. The Contract Law provision on this issue, Article 39, is not limited to consumer form contracts. Both it and the local legislation apply to all contract terms drafted in advance for the purpose of repeated use and thus encompass business/business, business/con-

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80. Enacted by the NPCSC on September 2nd, 1993 and effective from December 1st, 1993.

81. ZHONGHUA RENMIN GONGHEGUO FAN BUZHENGDANG JINGZHENG FA [ANTI UNFAIR COMPETITION LAW OF THE PEOPLE'S REPUBLIC OF CHINA] art. 5, in ZHONGHUA RENMIN GONGHEGUO XIN FAGUI HUIBIAN 1993 DI SAN JI [NEW COMPILATION OF LAWS AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA 1993 VOL. 3] 26-33 (1993) [hereinafter AUCL 1993].

82. AUCL art. 9.

83. *Id.* arts. 16-9.

84. *Id.* arts. 21, 29.

85. Enacted by the NPCSC on December 29, 1997 and effective from May 1, 1998.

86. ZHONGHUA RENMIN GONGHEGUO JIAGE FA [PRICE LAW OF THE PEOPLE'S REPUBLIC OF CHINA] art. 13, in ZHONGHUA RENMIN GONGHEGUO XIN FAGUI HUIBIAN 1997 DI SI JI [NEW COMPILATION OF LAWS AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA 1997 VOL. 4] 30-40 (1997) [hereinafter PRICE LAW 1997].

87. PRICE LAW 1997 arts. 41, 42.

88. Enacted by the NPC on March 15, 1999 and effective from October 1, 1999.

89. For a more detailed discussion of these and other related issues, see Mark Williams, *An Introduction to General Principles and Formation of Contracts in the New Chinese Contract Law*, 3 J. CONT. L. 1 (2001).

sumer and even consumer/consumer contracts (though presumably if a consumer repeatedly uses such a form contract, they would be considered traders).

Article 39 provides, as part of the over-riding obligation of fair dealing (Article 5, Contract Law), that a party providing standard terms should draw the other party's attention to any limitation or exclusion clauses and provide an explanation of them, if so requested. Standard terms are defined as those prepared in advance for repeated use and which are not individually negotiated. Article 40 then goes on to invalidate certain standard terms automatically, namely those which exclude liability for personal injury or for property damage caused by gross negligence or deliberate intent.

An example of local regulations intended to amplify the effect of the national Contract Law can be found in the recent Shanghai Regulations ("the Regulations").<sup>90</sup> These apply to written form contracts, including those in electronic format.<sup>91</sup> The content of unilateral offers are also covered but the Regulations only apply to consumer contracts for the supply of goods or services.<sup>92</sup> Some clauses are automatically void, namely those that seek to exclude liability for death or personal injury, property damage caused as a result of intent or gross negligence, and those that seek to restrict warranties of quality or fundamental terms of the contract.<sup>93</sup> Other clauses that impose inequitable burdens on consumers such as penalty clauses, unreasonable risk apportionment, and prevention of lawful termination by the consumer are also void.<sup>94</sup>

Further, an obligation of notice is placed on the proffering party; a consumer must be warned orally and in writing by the profferor that the form contract contains exclusion or limitation provisions. Notice must be given before the contract is entered into. Additionally, form contracts concerning a range of commonly acquired consumer products must be lodged with the municipal enforcement authority;<sup>95</sup> failure to do so could result in a fine. The authority can require alteration or amendment to the submitted clauses.<sup>96</sup> The authorities cannot declare any submitted form contract or clause void. Only a court can do so in pro-

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90. See SHANGHAI REGULATIONS ON SUPERVISION OF CONTRACT FORM CLAUSES (promulgated on July 14, 2000 and effective January 1, 2001) [hereinafter SHANGHAI REGULATIONS].

91. SHANGHAI REGULATIONS art. 3.

92. *Id.* art. 2.

93. *Id.* art. 6.

94. *Id.*

95. *Id.* art. 11.

96. *Id.* art. 12.

ceedings, but failure to file results in automatic invalidity, should the profferor seek to rely on the provisions.

The types of transaction covered by the Regulations include contracts for the sale or lease of real estate, property management contracts, travel services, supply of utilities, contracts of carriage, posts and telecommunications services and any others that might be later added to the list by the municipal authority. Consequently, many common consumer contracts are not covered, at least at the moment, by the Regulations.

Another interesting example of local legislation aimed at protecting new consumer interests is the recent Beijing Notice concerning Online Economic Activities<sup>97</sup> issued by the municipal Administration of Industry and Commerce. The Notice is limited in geographical effect to the city of Beijing and seeks to regulate Internet sales of goods and provision of services but not online auctions. The Notice seeks to extend all of the consumer protection provisions in national legislation to sales made via the Internet. It appears to protect Beijing residents who make contracts via the Internet. The notice appears to apply the national consumer protection provisions to goods or service providers wherever they are situated, provided they supply to Beijing residents. This could be in conflict with the rules relating to the place of formation of the contract and proper law of the contract under the Contract Law of 1999.<sup>98</sup> Presumably, any conflict between the provisions would be resolved through preemption by the Contract Law provisions, as this is a national statute and so, constitutionally, trumps local regulations.

## PRIVATE ENFORCEMENT

The average consumer's awareness of legally enforceable consumer rights is relatively low but it is improving. There are many reasons for this – inadequate education, a distaste for formalized confrontation of stronger organizations and a societal preference for compromise mediated by a middle-man known or respected by both parties. Further, a low level of confidence in the law and its administration and the lack of competent legal advisors willing or able to act in consumer cases for financial or

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97. See BEIJING MUNICIPAL ADMINISTRATION OF INDUSTRY AND COMMERCE, NOTICE CONCERNING PROTECTION OF THE LAWFUL RIGHTS AND INTERESTS OF CONSUMERS IN ONLINE ECONOMIC ACTIVITIES (July 7, 2000).

98. The place of formation of a contract under the Contract Law 1999 is governed by Article 34, which states that the place of formation of a contract is generally the place where acceptance occurs. However, where the contract is formed via electronic messages, the "recipient or addressee's" principal place of business is the place of formation. These rules are subject to contrary express intention of the parties. See CONTRACT LAW 1999 art. 34.

other reasons, especially against powerful economic actors, explain the low levels of consumer-related litigation.<sup>99</sup> However, as consumer education and confidence in using the law rises, more litigation is likely to occur.

In 1998 the Consumers' Association of China reported that it had handled 667,000 formal complaints, a 6.7% increase on the previous year.<sup>100</sup> Rural consumers, who make up between 70% and 80% of China's population, increased their level of complaints by over 30%, mainly over agricultural products. Urban consumers were most vexed by service providers – restaurants, posts and telecommunication services and decorators; but, real estate construction quality and buildings management were also major sources of complaint. Personal injury was also a significant problem with 1,214 people injured, of which seventy were permanently disabled and thirty-three killed by the use of substandard products. The most dangerous products were exploding beer bottles, gas burning water heaters, and motorcycles.

In 1999 things were no better and exploding beer bottles killed at least five persons and injured fifty-two in the period April-June 1999<sup>101</sup> and the total of official consumer complaints seemed to be set to rise to over 800,000 for the full year. The increase in complaints seems to be matched by people's rising awareness of consumer rights and a willingness to take action to remedy the infringement of their legal rights. In a survey conducted in March 2000 in several large cities, 84% of respondents said that they would complain to the Consumers' Association if they suffered from poor quality goods or services and 56% said they would go on to use the courts if they could not achieve satisfaction.

Clearly, the evidence shows that consumerism is gaining ground in China as the economic liberalization policy sensitizes the urban population to the possibility of redress. The younger and better-educated consumers are the most likely to know of their legal rights and to take action to uphold them. However, in

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99. For the breakdown of civil actions commenced in 1999, see 2000 CHINA STAT. Y.B. (China Statistics Press, Beijing.) *supra* note 2. Under the category "compensation cases," the number of actions was 332,708 in 1998 and 366,931 in 1999. Earlier years show lower numbers of cases, thus confirming a rising trend in non-commercial civil litigation. However, it should be noted that the statistics are not broken down into a category of "consumer cases" and so it is impossible to tell how many of the quoted numbers relate specifically to consumer disputes. There is a separate category of "commercial actions and family related matters", so a substantial number of the "compensation cases" must represent consumer cases. Presumably, personal injury and consumer cases arising from all causes fall within the category of "compensation cases".

100. *Quality Problems Draw Many Complaints*, CHINA DAILY, Feb. 24, 1999.

101. Su Dan, *Complaints by Consumers Rising*, CHINA DAILY, July 14, 1999, at 2.

using litigation, the prospects of establishing liability, the level of damages or the ability to enforce payment of damages awarded are very hard to assess. Anecdotal evidence suggests that each stage is fraught with difficulties. But, for an established company the threat of effective enforcement is clearly high. The quantum of damages that might be awarded is also difficult to ascertain due to the opacity of the judicial process and the lack of accurate case reporting.

Market entrants to China, or those companies seeking to expand sales, should be aware of these trends and risks. However, as most products and services provided by multi-nationals operating in China are produced according to international quality and safety standards, they should have relatively fewer concerns about legal liability claims than their domestic Chinese competitors. Traditionally, it is the domestic firms that suffer from the worst quality and safety problems. The accession of China to the WTO, the reduction of protective tariffs and quotas and the subsequent increase of competing foreign made, higher quality products at possibly lower prices, may only serve to weaken the position of the local producers.

## CONCLUSION

The further opening of the Chinese domestic market represents an opportunity for global business but it is not one without risks. Growing consumer awareness of the possibility of legal redress for harm sustained as a result of the supply of goods and services is one of the factors that prudent businesses should take into account before committing to the Chinese market. Actual or perceived product or service defects in goods or services provided by foreign businesses may allow Chinese consumers to make legal claims. These potential claims may cause substantial direct financial loss to the firm as well as the loss or damage to the reputation of the product or service concerned. As we have seen in several cases, a foreign business presents a tempting target.

On a more general level, the growth of the market sector in China's economy has fostered an awareness of the positive value of law in a section of the population that formally regarded law as purely an instrument of the state's coercive power. If the evidence is to be believed, consumers in China may be leading the vanguard of a society that places more trust in a system of law as the regulating mechanism of society. In the past, reliance on the political power of the state or of well-connected individuals was the only possible way to seek redress. The growth in the number of middle class consumers, with their ability to accumulate

wealth and to use some of it to buy products and services of ever increasing value, is a new and remarkable feature of economic development in China. The consumerism of this property owning middle class may be the means by which China eventually becomes a society increasingly ruled by law, rather than by man.